

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

JOCELYNNE FALLGATTER and JEFF)	
KIRKMAN,)	Case No. 05-3-0035
)	
Petitioners,)	(Fallgatter IV)
)	
v.)	
)	
CITY OF SULTAN,)	ORDER DENYING
)	DISPOSITIVE MOTION
Respondent.)	
)	

I. PROCEDURAL HISTORY

On June 27, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jocelynn Fallgatter and Jeff Kirkman (**Petitioners** or **Fallgatter**). The matter was assigned Case No. 05-3-0035, and is hereafter referred to as *Fallgatter IV v. City of Sultan*. Petitioners challenge the City of Sultan’s adoption of Resolution R05-08, adopting a water and sewer availability procedure. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On July 1, 2005, the Board issued a “Notice of Hearing” setting July 28, 2005, as the date for a prehearing conference (**PHC**). On that date, the Board held the PHC, and issued its prehearing order (**PHO**) establishing the final schedule and Legal Issues to be decided in this matter.

At the PHC, the City of Sultan submitted a “Motion to Dismiss” (**Sultan Motion**). The City seeks to dismiss the PFR contending that the Petitioners’ challenge is untimely, or in the alternative, that the Board does not have subject matter jurisdiction to review the challenged enactment – R05-08.

On August 29, 2005, the Board received Petitioners’ “Response to City of Sultan’s Motion to Dismiss” (**Fallgatter Response**).

On September 6, 2005, the Board received “City’s Rebuttal to Response” (**Sultan Reply**).

The Board did not hold a hearing on the motions.

II. DISCUSSION OF MOTION TO DISMISS

Resolution R 05-08 was adopted by the City of Sultan on April 27, 2005. The City claims the PFR was filed more than sixty days after the Resolution's enactment and further, the City is not required to publish notice of adoption of such an enactment pursuant to RCW 36.70A.290(2), and it did not publish such notice. Sultan Motion, at 3. Alternatively, the City asserts that the Board does not have jurisdiction to review the challenged resolution since, the City claims, it is not a development resolution. *Id.* at 4-6.

Petitioners assert that their PFR was timely filed, especially since there was no published notice that the resolution was adopted. Therefore, the sixty-day appeal window is *still* open. Fallgatter Response, at 1-3. Further, Petitioners contend that a procedure for the allocation of the City's limited sewer and water services is a development regulation pursuant to the GMA and subject to the Board's review. *Id.* at 4-10.

In reply, the City agrees that utility policies impact development, but that does not mean all utility policies are subject to Board review. The City suggests that if the City's Plan provided for extending sewer into the rural area, the Board would have review authority. Sultan Reply, at 2. Here, however, the City argues, the challenged resolution adopted policies on how it will consider requests for service, including informing applicants that the City has limited sewer capacity and will not provide service outside the City's UGA, and will prioritize requests within the city limits. *Id.* The City concludes that these utility policies and procedures are not development regulations within the purview of the GMA or the Board. *Id.* at 3-5.

The Board **agrees** with Petitioners that the challenge was timely filed. In the first place, the Board received the PFR within 60 days of enactment of the challenged action. The PFR was filed with the Board on June 27, 2005. The 60th day after enactment on April 27th was a Sunday. Therefore, pursuant to WAC 242-02-060, the cut-off for filing [had there been publication on 4/27/05] would be 6/27/05.

Additionally, as the Board discussed in a prior case,

If notice of the GMA action is not published there is no closure of the appeal period and no protection provided by RCW 36.70A.290(2). However, once published, the protection provided by RCW 36.70A.290(2) is available. That protection is a limitation on the appeal period. Publication established the sixty-day deadline beyond which petitions may not be filed with the Board, thereby providing certainty to the jurisdiction regarding exposure to GMA challenges.

Jody L. McVittie v. Snohomish County [Snohomish County-Camano Island Realtors – Intervenor; 1000 Friends of Washington – Amicus curiae] (McVittie IV), CPSGMHB Case No. 00-3-0005, Order on Dispositive Motion, (Apr. 25, 2000), at 4-5. Since the

City of Sultan declined to afford itself the protection of establishing the sixty-day appeal window, the filing of Petitioners is timely.

The Board also **agrees** with Petitioners that Resolution R 05-08, establishing a procedure for the allocation of sewer and water services, is a development regulation, pursuant to RCW 36.70A.030(7), and subject to Board review. RCW 36.70A.030(7) defines a development regulation as:

[T]he controls placed on development or land use activities by a county of a city, including but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

A procedure that allocates sewer and water services, and distinguishes and prioritizes among requests within the existing City limits, within the City's urban growth area (UGA) and areas outside of the UGA, certainly is a control placed upon development and land use activities. As such, the sewer and water availability allocation procedure adopted by the City of Sultan in Resolution R05-08 is a development regulation, as defined by RCW 36.70A.030(7) and subject to review by this Board.

Much of the City's reply goes to the merits of the City's actions; however, the merits of the City's policies and procedures – whether they run counter to the GMA – will be determined following briefing, the hearing on the merits, and in the FDO, not in this Order.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

III. ORDER

Based upon review of the Petition for Review, the briefs and materials submitted by the parties, the Act, and prior decisions of this Board and other Growth Management Hearings Boards, the Board enters the following Order:

- Petitioners' petition for review was **timely** filed and the **Board has subject matter jurisdiction to review** the challenged enactment – Resolution R 05-08, a development regulation.
- The City of Sultan's Motion to Dismiss is **denied**.

So ORDERED this 14th day of September 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300.